

STATE OF COLORADO

DEPARTMENT OF REVENUE
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John W. Hickenlooper
Governor

Barbara J. Brohl
Executive Director

GIL-14-004

February 5, 2014

XXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Sales Taxability of Federal Excise Tax on Jet Fuel Sales

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXXXXXXXXXXXXXX ("Company") a request for guidance regarding the sales taxability of federal excise taxes on jet fuel sales.

The Colorado Department of Revenue ("Department") issues general information letters and private letter rulings. A general information letter provides a general overview of the relevant tax issues and is not binding on the Department. A private letter ruling provides a specific determination for a specific set of facts, is binding on the Department but not on the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department regulation 24-35-103.5 at www.colorado.gov/revenue/tax > Tax Library > Rulings.

The Department initially treats your request as one of a general information letter. If you would like the Department to issue a private letter ruling on the issues you raise, you can resubmit a request and fee in compliance with regulation 24-35-103.5. It is important to remember that general information letters, such as this one, are general discussions of tax law and are not a determination of the tax consequence of any particular action or inaction.

Issue

Are federal excise taxes included in the calculation of Colorado sales taxes on jet fuel sales in Colorado?

Background

Company is based outside of Colorado and is a leading marketing company of aviation and marine fuel products. Effective January 2005, the federal government changed the structure of the federal excise tax. Company asserts that due to this change, the federal excise tax is now considered a direct federal tax and, thus, not included in the calculation

of sales tax because the purchase price upon which sales tax is calculated excludes any direct tax imposed by the federal government.

Discussion

Colorado levies sales tax on fuel, unless the fuel is subject to Colorado excise tax on fuel described in §39-27-102, C.R.S. Aviation fuel used by domestic and foreign “Part 121 air carriers,”¹ “Part 135 commuter air carriers,”² and “direct air carriers,”³ are exempt from Colorado excise fuel tax.⁴ Therefore, these exempt air carriers must pay sales tax on their fuel purchases.

Sales tax is calculated based on the price charged to the customer. However, if the purchaser is levied a direct federal tax, the sales tax calculation excludes the direct federal tax.⁵ A direct federal tax is a tax levied by the United States on the taxpayer, which, in the case of sales tax, is on the purchaser. A direct federal tax is distinguishable from an indirect federal tax, which is a tax levied by the United States on a person other than the purchaser, such as the seller, wholesaler, or manufacturer.⁶ For example, a federal tax levied on the purchaser of a luxury motor vehicle is direct tax, and, therefore, excluded from the calculation of the Colorado sales tax. In contrast, a federal excise tax on a motor vehicle manufacturer is not excluded from the calculation of Colorado sales tax paid by the consumer to the automotive retailer even if the retailer expressly passes the cost of the federal tax on to the consumer.

The United States levies an excise tax on, among things, the sale, exchange, or entry of aviation gasoline and kerosene used in aviation. In some instances, the federal excise tax is a direct federal tax for purposes of the Colorado sales tax because the tax is levied on the aircraft operator, which is the ultimate consumer of the aviation fuel. For example, an aircraft operator is liable for federal excise tax on fuel removed directly into the fuel tank of an aircraft used in commercial aviation if certain conditions are met.⁷ The aircraft operator is also liable for Colorado sales tax, and not Colorado excise fuel tax, if it is a “Part 121 air carrier”, “Part 135 air carrier”, or a “direct air carrier”, and, if the aircraft operator pays the federal excise tax, that tax is excluded from the calculation of the Colorado sales tax. However, if the fuel is owned by the position holder, someone who sells fuel to the end user, and the federal excise tax is paid by the position holder, then the federal excise tax is not subtracted from the price paid by the end user (i.e., aircraft operator) for purposes of calculating the Colorado sales tax, even though the position holder expressly passes the cost of the federal excise tax on to the end user. Similarly, a federal excise tax is imposed

¹ §39-27-101(19), C.R.S.

² §39-27-101(20), C.R.S.

³ §39-27-101(6), C.R.S.

⁴ §39-27-102(1)(a)(IV)(B), C.R.S.

⁵ §§39-26-102(7)(a) and 104(1)(a), C.R.S.

⁶ Colorado Department of Revenue Determination No. 2 (1/1/1993); compare, *United States v. Lohman*, 74 F.2d 863 (8th Cir. C.A. 1996) (Immunity from direct state tax means a state tax levied on federal government as purchaser and not state tax that is levied on someone other than the purchaser, even though cost of tax passed on to federal government).

⁷ See IRS Publication 510 (Rev. July 2012), pg. 11.

on the party receiving aviation gas as part of a two-party exchange if certain qualifications are met.⁸ If the recipient is an aircraft operator which is also the ultimate consumer and, therefore, liable for Colorado sales tax, then the direct federal excise tax is not included in the sales tax calculation.

Miscellaneous

This letter represents the good faith opinion of Department staff who are knowledgeable of state taxes issues. However, the Department does not make a specific determination here on any of the issues raised and the Department is not bound by this general information letter.

The Department administers state and state-administered local sales and use taxes. This letter does not address sales and use taxes administered by home-rule cities and home-rule counties. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at www.colorado.gov/revenue/tax for more information about state and local sales taxes.

Enclosed is a redacted version of this letter. Pursuant to statute and regulation, this redacted letter will be made public within 60 days of the date of this letter. Please let me know in writing within that 60 day period whether you have any suggestions or concerns about this redacted letter.

Sincerely,

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⁸ See IRS Publication 510 (Rev. July 2012), pg. 5.